

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KARI MCMULLEN)	
Claimant)	
VS.)	
)	
TOWN & COUNTRY KITCHEN)	Docket No. 251,384
Respondent)	
AND)	
)	
TIG INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the August 22, 2002 Award of Administrative Law Judge Bruce E. Moore. Claimant was found to be permanently totally disabled as a result of injuries suffered on July 3, 1999, while employed with respondent. The Appeals Board (Board) held oral argument on March 4, 2003.

APPEARANCES

Claimant appeared by her attorney, Jeffrey E. King of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to future medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be affirmed. The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

The Board finds particularly persuasive the testimony of orthopedic surgeon Lee R. Dorey, M.D., and vocational expert Doug Lindahl that claimant is essentially and realistically unemployable. While it is believed by some experts that claimant may be capable of working part time, even part-time work would require substantial accommodation, as it would necessitate frequent breaks to allow claimant to change positions and occasionally lie down. The likelihood of finding a job within those restrictions in this economic environment is doubtful, at best.

The Administrative Law Judge, in finding claimant permanently and totally disabled, relied upon the Kansas Court of Appeals decision in *Wardlow*.¹ The facts in *Wardlow* are similar to those here in that both claimants were limited to part-time positions with limited training. In *Wardlow*, the claimant had a background of working physical, manual labor jobs. Here, claimant has worked only low-skilled, minimum-wage jobs. The Administrative Law Judge found that claimant's "theoretical ability to work up to three hours per day at minimum wage does not amount to 'substantial gainful employment,' particularly where there is no evidence of jobs that she could perform on such a limited basis within her work restrictions."

Respondent's expert, Karen Crist Terrill, testified that claimant could find those types of jobs, but, when pressed, Ms. Terrill was unable to identify any specific jobs available in claimant's geographic area.

The Board ultimately concludes, as did the Administrative Law Judge, that this claimant is permanently and totally disabled from substantial and gainful employment and, therefore, the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated August 22, 2002, finding claimant to be permanently and totally disabled, should be, and is hereby, affirmed.

¹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation